

Committee on Resources

Witness Testimony

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On behalf of
THE EDISON ELECTRIC INSTITUTE
BEFORE THE
HOUSE RESOURCES COMMITTEE
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I would like to thank the Chairman and the members of the Committee for providing me this opportunity to testify on behalf of the Edison Electric Institute (EEI). EEI is the association of shareholder-owned electric utilities, industry associates, and international affiliates. Our U.S. utility members provide electricity to over 70% of all end users nationwide. It is on behalf of these members that I am providing the following testimony on H.R. 3160, *Common Sense Protections for Endangered Species Act*.

For 26 years, the Endangered Species Act (ESA or the Act) has focused on conservation and preservation of species and habitat, and has reshaped the relationship between the American public and the other species with which we share our natural environment. As is the case with any far-reaching statute, the past 26 years of implementation of the ESA has been a learning process for the administering agencies and the regulated public. We have learned how to change our resource use and management practices to help pursue the goals of the Act, and the U.S. Fish and Wildlife Service and National Marine Fisheries Service (Services) have developed many strategies and regulations to implement provisions of the Act. I preface my comments today with a strong support of the goals of the Act and its achievements, and see H.R. 3160 as an opportunity to strengthen the Act by incorporating the lessons learned over the past 26 years of its history.

In 1993, EEI adopted a policy for reform of the ESA, articulating a number of concerns our industry has with regard to requirements of the Act, its administration, and impacts of the Act on the industry's ability to provide safe and reliable electric service to our customers. Our experience shows that certain improvements in the ESA should be undertaken if the Act is to be implemented in a realistic, predictable and workable manner, including improvements that will:

Provide incentives and innovative options to property owners to encourage habitat preservation.

Establish a fair and reasonable consultation process as an option to habitat conservation plans (HCPs)

for non-federal parties.

Use sound scientific data, expedite and improve the designation of critical habitat and the implementation of recovery plans.

Improve the process for obtaining incidental taking permits under Section 10.

Allow access to and emergency repair of facilities to preserve essential services without liability for incidental taking.

As a representative of this industry, I am very much encouraged by the fact that H.R. 3160 addresses many of these concerns. In my testimony today, I wish to reinforce the importance of the amendments that H.R. 3160 would make to the ESA through discussion of the impact the ESA currently has on the electric utility industry. In addition, I will identify some of the opportunities these amendments create for our industry to assist the agencies administering the Act in achieving the goals of species conservation and recovery, while accomplishing our primary mission of providing safe, reliable, and economical energy resources to the U.S. economy.

Background: The Electric Utility Industry and Interaction with the ESA

Operations and Maintenance

The generation and delivery of electricity involve extensive uses of land and water. In order to deliver electric power to commercial users and individual citizens, electric utilities maintain more than 670,000 miles of transmission line rights-of-way (ROW). In addition, nearly 90 percent of the electricity used in the United States is generated from nuclear or fossil fuel in steam-electric processes that depend on water resources for cooling, makeup water, and other operations essential to providing reliable electricity. Much of the remaining electricity comes from hydropower projects, which rely on the weight of falling water to turn turbines to generate electricity. Hydroelectric projects often preserve significant lands surrounding the project which can benefit numerous plants and animals. All of these land and water uses provide opportunities to maintain and protect species and their habitat.

Like many other complex systems, electric utility systems require periodic maintenance to avoid disruptions of electric service. Such disruptions, or outages, can have serious economic and human health and safety impacts. Because utilities provide an essential service necessary for public health, safety and welfare, the licensing and permitting agencies that regulate utilities, recognizing that poor maintenance will result in system problems, mandate much of the maintenance we do and in some cases dictate its frequency. Routine maintenance activities include:

- insulator washing
- insulator replacement and repair
- repair and replacing conductors
- pole brushing (removal of flammable vegetation from base of wood poles)
- tree trimming

- access road re-grading and maintenance
- pole line inspection
- repair or replacement of structures supporting utility equipment
- pipeline erosion repair
- pipeline leak patrolling
- pipeline repair & replacement
- exposed pipeline repair
- hydro project land and water management activities

In order to provide reliable service, utilities must perform all of these maintenance operations when needed and when weather permits. This means most of these operations must be performed during the spring and summer, which are often sensitive seasons for many protected species. As a result, conducting routine utility field operations in natural areas presents an unavoidable opportunity involvement with the ESA.

For electric systems, deferred maintenance has potentially serious consequences. Three of the most common are outages, equipment damage, and fire. If insulators are not washed, flashovers will almost certainly occur, resulting in outages and potentially, catastrophic fires. If a flashover occurs, electric transmission equipment is always damaged and must be replaced. Flashovers can also cause a surge in electricity that can damage sensitive customer-owned equipment that rely on the stable operation of the electrical system. Additionally, the reliability of the transmission grid can be seriously compromised.

While fires resulting from flashover can damage utility structures, the damage to surrounding land is also a concern. If unperformed maintenance results in a fire, extensive damage to the habitat, including the potential loss of many individual plants and animals can be expected. Ironically, when agencies delay or prevent maintenance out of concern for species and habitat, they may actually facilitate take and habitat destruction by fire.

Gas systems require less maintenance than electric systems, because the majority of the system is underground and is not exposed to the elements. However, when maintenance is needed, it is no less critical than for the electric systems. Outages, fire and damage to the environment are all potential consequences of deferred repair and maintenance. The magnitude of the adverse consequences, as with electric equipment, increases with the size and capacity of the facility.

Emergency Repairs

Routine maintenance is crucial to maintaining electric facilities. Maintenance, such as the removal of tall growing trees from the immediate vicinity of overhead transmission lines, can provide additional protection against particularly severe outages that result from storms, flooding, fires, and other natural disasters. History has taught us, however, that utility systems will be disrupted by the occasional and unpredictable forces of weather and other emergent disasters. In these cases, restoration of electric service is of utmost importance for protection of public health and the environment. Such is the case in particularly hot or cold weather or climates, and when electricity is necessary for the operation of equipment that protects the

environment, such as wastewater treatment plants. In such cases, consultation under Section 7 of the ESA may not be practical or prudent if it delays restoration of service, thereby imperiling human health or the environment. While our industry is committed to quickly restoring service in response to any disruption, we are concerned that accomplishment of this primary mission can conflict with the consultation requirements of the ESA.

Benefits of Electric Utility Resource Management to Endangered Species and Habitat

For decades, electric utilities have worked with the Services through various consultation mechanisms, and have expended hundreds of millions of dollars to minimize the impact of the construction, operation, and maintenance of generation, transmission, and distribution facilities on endangered species, and to improve the environmental and social benefits of the air, lands and waters the companies use or manage. For example, hydroelectric projects often provide minimum or supplemental flows, habitat, and fish passage features to protect and enhance fisheries. Similarly, transmission structures have been designed in many cases to provide perches for endangered raptors and other avian species, and flora and fauna often flourish in the "edge habitat" provided through vegetation management on utility rights-of-way. Furthermore, integrated maintenance of utility rights-of-way promotes low-growing grass and shrub habitat, providing a level of succession that can be absent from forested areas, and can serve as a migration corridor for birds and other species that need to travel to areas of refuge through more developed regions.

The U.S. Fish and Wildlife Service provides a course in how rights-of-way can be managed as wildlife habitat to its employees and members of the public. The creation of this course, which resulted from the cooperative efforts EEI and the Service, exemplifies our industry's ongoing effort to approach resource management and environmental stewardship in a spirit of cooperation and to facilitate best management practices through industry-government partnerships. Our industry continues to seek avenues to work with the Service, either through informal consultation or when necessary through habitat conservation plans, candidate conservation agreements, voluntary conservation plans, and other formal measures to ensure healthy biota including the protection of endangered species. The goal of building these partnerships and forging cooperative agreements is to promote cooperative solutions to resource management and species impact issues. One such forum, the Avian Power Line Interaction Committee, was formally recognized by the U.S. Department of the Interior and received the distinguished Conservation Service Award in 1999.

Examples of rights-of-way serving as valuable habitat for endangered species are numerous. The San Diego County Multi-Species Habitat Conservation Plan (MSCP), the first MSCP ever developed, relies heavily on utility rights-of-way as corridors connecting refuge areas to minimize habitat fragmentation. When this MSCP was finalized in 1997, Secretary Babbitt characterized its importance to both species protection and the wise development of land resources with the following quote:

As a result of this MSCP and other conservation plans around the country, many species may now avoid the 'intensive care' unit of being listed under the Endangered Species Act... ..The San Diego model is a magnificent achievement, and a lasting tribute to the diverse group of local stakeholders who worked so diligently to bring it to this point."

The Wisconsin Karner Blue Butterfly HCP, the first state-wide HCP ever developed, also depends on utility rights-of-way, since the butterfly's primary habitat is the lupine plant, a prairie species that flourishes on utility rights-of-way. The participation of electric utilities as partners in this HCP, the characteristics of rights-of-way, and the management by electric utilities of these lands allowed for the creation of a plan that resolves development and species conservation concerns through partnership and the identification of

sensitive management practices. Secretary Babbitt made the following statement regarding the Karner Blue Butterfly HCP:

"This is the first comprehensive statewide Habitat Conservation Plan and the most inclusive agreement of its kind in the country. It is an excellent example of how the flexibility of the Endangered Species Act can promote regional habitat conservation planning by states and local governments and is a model for what other states and their partners might consider."

The electric utility industry strongly supports a flexible approach to administration of the ESA that would create even more opportunities for this type of partnership. We believe that statutory improvements to ESA would facilitate achievement of this goal.

Elements of H.R. 3160 That Specifically Address Concerns of EEI and its Members

Title I -Improving Scientific Integrity of Listing Decisions and Procedures

EEI shares the opinion that decisions made with respect to listings and designation of critical habitat should be those supported by the best available scientific and commercial data. Decisions made under the ESA will always have impacts on how resources are managed and used, and therefore will have impact on U.S. citizens, businesses, private landowners, and the U.S. economy. These decisions should be made carefully, should reflect best available science and commercial data, and incorporate an understanding of the development and management practices in question. Listing decisions should also contain due process to those who bear the burden of management and restrictions. H.R. 3160 advances each of these concerns and clarifies the responsibility to scientific integrity in listing decisions and procedures.

Title II -Complying With All Federal Laws and Missions

The electric utility industry is one of the most regulated industry sectors. As a result, we are very familiar with cases in which the missions of different federal regulatory agencies, and the requirements of federal regulations, can come into conflict. In the construction, operation, and maintenance of lineal transmission facilities and of generation facilities (especially hydroelectric projects), utilities routinely require licensing, permitting, or consultation with several agencies. Thus, EEI recognizes the value of provisions in H.R. 3160 that improve these interactions, including:

- Setting deadlines for the initiation of federal inter-agency consultation under ESA.
- Requiring the Secretary to demonstrate applicability of Section 7 to any property prior to requiring formal consultation.
- Ensuring that listing or critical habitat designation decisions are based on sufficient data.
- In cases of new listings, H.R. 3160 allowing site-specific actions under federal resource management plans (such as National Forest Plans) to continue on an interim basis prior to the completion of consultation under the Act.
- Establishing deadlines for completing consultation under the ESA.
- Obtaining permittee input in discussions relevant to the impact of the proposed action prior to the development of a draft biological opinion. This consultation will promote biological opinions that

consider not only the possible impacts on a species or habitat, but the probability of such impacts actually occurring, as well as the practical considerations and management practices that can be undertaken to avoid such impacts. When the proponent identifies such reasonable and prudent alternatives, the Secretary must provide an explanation if these alternatives are not included in the Biological Opinion.

- Requiring reasonable and prudent alternatives. This provision guarantees that reasonable and prudent alternatives identified under section 7 be within the nature, scope, and extent of the effect of the proposed activity, and be technically and economically feasible for the proponent to implement.
- Requiring that other agencies must honor and no agency may seek to amend or add to the obligations established through consultation under Section 7. This provision helps to avoid duplicative and redundant consultations when more than one agency is involved in the permitting of an electric utility facility, such as the relicensing of a hydroelectric facility.
- Recognizing that routine maintenance of utility facilities not be delayed by unnecessary consultations.
- Recognizing that in emergencies, repairs necessary to protect human health and the environment should not be delayed by unnecessary consultation requirements. H.R. 3160 also establishes that consultations on repair and maintenance activities should be completed in a timely manner (within 10 days of any request).

Title III -Permitting and Enforcement

H.R. 3160 makes a number of important changes to the manner in which sections of the ESA are enforced, and the manner in which permits are issued and administered. These changes include:

- Exempts routine and emergency maintenance and repair of electric utility transmission and distribution facilities and rights-of-way from take under ESA. This provision promotes reliability of the electric transmission and distribution system.
- Provides the Secretary with the option of waiving consultation in cases of permit renewal if the issuance of a renewal will not impact the species. This provision avoids unnecessary delays in the permit renewal process.
- Directs that permittees in compliance with their permits should not be subject to additional restrictions or requirements under the Act. This provision will allow utilities to be aware of their ongoing responsibilities, and to plan for management and expenses necessary to comply with those requirements.
- Codifies Safe Harbor Agreements with Assurances. This tool, which allows the Secretary to enter into cooperative management agreements with private landowners, promotes a cooperative approach to species protection and recovery that balances the needs of development interests and employs the voluntary participation of private resource users and land managers.

Title IV -Recovery Planning

H.R. 3160 makes a number of improvements to the Recovery Planning process that improve administration

of the ESA. These improvements include:

Establishment of priorities with regard to recovery planning. These recovery planning priorities are based on sound science.

Inclusion of resource users or developers in the recovery planning process. This provision provides that those skilled in the management of resources, such as utility right-of-way managers and engineers, will be part of the recovery planning process, and that the economic impact of the recovery plan will be evaluated as the plan is developed.

Requirements that critical habitat designation be based on the best available scientific and commercial data, and that critical habitat designation consider economic impacts.

Title V -Miscellaneous

Under title V, H.R. 3160 authorizes the appropriation of \$10,000,000 each year to assist in funding the implementation of safe harbor agreements under new section 10(l) for FY 2001 through 2004. This provision insures that some public resources will be provided to help share the costs of species protection and recovery borne by private landowners.

Other Recommendations

Two important areas of concern that may not be directly addressed by H.R. 3160 are (1) multiple consultation requirements under sections 7, 9, and 10 of the Act in the context of long-term licenses or permits, and (2) the impact of subsequent listings or "discoveries" on existing licenses, permits, and incidental take permits issued under a Multi-Species Habitat Conservation Plans. We recommend changes to the Act that would address these issues, and provide the following background on these problems.

Long-Term Projects and the ESA

Projects that have long-term federal permits or licenses, such as hydropower projects licensed by the Federal Energy Regulatory Commission and transmission lines located on federal lands managed by the U.S. Forest Service or Bureau of Land Management, may undergo extensive, substantial environmental review when they are licensed or permitted. Yet under the ESA, they currently can face further review, even as to fish and wildlife issues already addressed in the earlier review.

Most major electric facilities that involve federal permitting undergo significant federal reviews protective of fish and wildlife. Those reviews include environmental analyses under the National Environmental Policy Act, fish and wildlife reviews under the Fish and Wildlife Coordination Act and sections 10(j) and 18 of the Federal Power Act, and even reviews as to threatened and endangered species under section 7 of the ESA.

Yet, if a species is newly listed subsequent to issuance of a federal license or permit, the project owner may face another round of review under the ESA, even though the project is carefully operated for the benefit of fish and wildlife including the listed species. Conversely, during the license or permit term, a project owner may sign onto a habitat conservation plan as to one or more listed species, only to have to "start over" with a new section 7 consultation when the project comes up for relicensing or re-permitting.

If a project has undergone review protective of fish and wildlife, it should not have to undergo further ESA

review under section 7 or section 10 simply because of a subsequent relicensing or listing. At a minimum, any subsequent review should be streamlined, and the federal agencies involved should recognize the fish and wildlife conditions already imposed on the project. The agencies should take care to avoid layering unnecessary or duplicative requirements on the project, and should avoid cumulative requirements that are unduly burdensome. Furthermore, in the context of an HCP followed by a relicensing, all the federal agencies involved should honor commitments made during the development of the HCP, including safe harbor and no-surprises agreements. H.R. 3160 addresses many of these concerns. But we would like the opportunity to provide additional recommendations.

Multi-Species Habitat Conservation Plans and Subsequent Listings

In researching the impact of the ESA on electric utility operations and maintenance, EEI became aware of a problem that has recently arisen in the practice of the San Diego County Multi-Species Habitat Conservation Plan. This plan, which includes 110 species, did not consider (at the direction of the U.S. Fish and Wildlife Service) the presence of one species, the Quino Checkerspot Butterfly, when it was developed. Fortunately for the Quino Checkerspot Butterfly, it is attracted to plants commonly occurring in utility rights-of-way, and has subsequently been found to flourish in the area covered by the San Diego MSCP. Unfortunately for the partners of the MSCP, many activities previously covered by the MSCP will now require a separate section 10 consultation before they can proceed, all because one species was mistakenly omitted from the original plan.

Partners in an HCP often assist in the development of plans at great expense to themselves. It seems unjust and unnecessary that requirements of the act should eliminate the benefits of the HCP to the partner, specifically the incidental take permit that allows them to continue the development or management of their land or practice otherwise lawful activities, when a single species is overlooked in the development of the plan. EEI supports changes to the HCP development process that would allow MSCPs and their related incidental take permits to cover newly-listed endangered species or species thought previously to be regionally extinct unless the Secretary demonstrates that amendments to the MSCP are necessary in order to avoid jeopardy to the species. The Service should develop a timely and effective process for amending an MSCP that avoids unnecessary new requirements, and takes into account the existing protection such plans provide for unlisted species.

Summary

In conclusion, it is important to emphasize the conservation of natural resources in an important part of the electric utility industry's stewardship of the lands we manage or use. Our industry realizes that this stewardship is an important part of our business, and necessary to ensuring the safe and reliable delivery of electric power.

I would like to again thank the Chairman and members of the Committee for this opportunity to address issues of concern to our industry regarding the Endangered Species Act, and I am available to answer any questions you may have about my testimony or about our industry's interaction with the ESA.

Thank you.

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